FORM NLRB-4477
(2-85)

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
SEVENTEENTH REGION

Coffeyville, Kansas

COFFEYVILLE REGIONAL MEDICAL CENTER

Employer

and

Case 17-RC-12221

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 123

Petitioner

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9*(c)* of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board; hereinafter referred to as the Board.

Pursuant to the provisions of Section 3*(b)* of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record in this proceeding, the undersigned finds:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

2. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein. **1/**

3. The labor organization involved claims to represent certain employees of the Employer.

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9*(c)(1)* and Section 2*(6)* and *(7)* of the Act.

5. The following employees of the Employer constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9*(b)* of the Act: **2/**

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All full-time and regular part-time staff registered nurses employed in the Nursing Services Department, engaged in patient care at the Coffeyville, Kansas, facility, and all PRN nurses employed at the Coffeyville, Kansas, facility who have worked a minimum of 120 hours during either of the two three-month periods preceding September 16, 2003, EXCLUDING: temporary agency nurses, guards and supervisors as defined in the Act.

DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the undersigned among the employees in the unit*(s)* found appropriate at the time and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the unit(s) who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, in an economic strike which commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements are eligible to vote. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees

engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and emloyees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for collective bargaining purposes by

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 123

LIST OF VOTERS

In order to insure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses which may be used to communicate with them. **Excelsior Underwear, Inc**., 156 NLRB 1236 (1966); **N.L.R.B. v. Wyman-Gordon Company**, 394 U. S. 759 (1969). Accordingly, it is hereby directed that within 7 days of this Decision, two copies an election eligibility list, containing the names and addresses of all the eligible voters, shall be filed by the Employer with the undersigned/Officer-in-Charge of the Subregion who shall make the list available to all parties to the election. In order to be timely filed, such list must be received in the Regional Office, 8600 Farley Street - Suite 100, Overland Park, Kansas 66212-4677 on or before **September 23, 2003**. No extension of time to file this list shall be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement here imposed.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, D.C. 20570. This request must be received by the Board in Washington by **September 30, 2003**.

Dated September 16, 2003

at Overland Park, Kansas

Acting Regional Director, Region 17

1/ The Employer is a Kansas corporation engaged in business as an acute care hospital at its 1400 W. Fourth Street, Coffeyville, Kansas, facility, the only facility involved here.

2/ The parties stipulated that an appropriate unit consists of: all full-time and regular part-time staff registered nurses employed in the Nursing Services Department, engaged in patient care at the Coffeyville, Kansas, facility, and all PRN nurses employed at the Coffeyville, Kansas, facility who have worked a minimum of 120 hours during either of the two three-month periods preceding September 16, 2003, EXCLUDING: temporary agency nurses, guards and supervisors as defined in the Act. The sole issue in this matter is whether the Petitioner has a disqualifying conflict of interest and, on that basis, the petition should be dismissed.

THE ISSUES AND DETERMINATION

The Employer contends that the Petitioner's officials' relationship with the City of Coffeyville (City) creates a clear and present danger of conflicts of interest sufficient to taint and improperly affect its role as the bargaining unit employees' collective-bargaining agent. The Employer's primary assertions are that the Petitioner's Business Manager Dee Messer's position as a City Commissioner as well as the Petitioner's status as collective-bargaining agent for certain of the City's employees, will unlawfully taint the potential collective-bargaining relationship between the Employer and the Petitioner and compromise the Petitioner's ability to represent bargaining unit employees.

In contrast, the Petitioner contends that: (1) Messer's role as a City Commissioner and the Petitioner's role as bargaining agent for City employees is so far removed from the operation of the Employer's facility that no disabling conflict of interest exists; and

(2) the Petitioner's efforts to insulate Messer from potential conflicts of interest stemming from his role as a City Commissioner is sufficient to avoid the potential of tainting the collective-bargaining process.

For the reasons set forth below, I find that there is insufficient evidence that there exists a clear and present danger of a disabling conflict of interest in the Petitioner or Business Manager Messer. Furthermore, I find that the stipulated unit is an appropriate unit for collective bargaining and I shall direct an election in that unit.

THE FACTS

The Employer's Facility

The Employer employs approximately 465 employees at its facility, including approximately 125 supervisory and non-supervisory RNs. The facility opened in 1949 as Coffeyville Memorial Hospital, a City-owned, non-profit hospital. The facility is managed by a Board of Directors, which, since 1985, has delegated the day-to-day management of the facility to a private hospital management company. In 1996, the Board of Directors and the City agreed to create Coffeyville Regional Medical Center, Incorporated, (CRMC) a private non-profit corporation formed pursuant to Section 501(c)(3) of the Internal Revenue Code.

Since the incorporation in 1996, a seven-member Board of Trustees has governed the Employer at the corporate level. The City, through its five-member City Commission, appoints members to the Board of Trustees. The Board of Trustees, in turn, appoints members to the seven-member Board of Directors. Pursuant to the Employer's by-laws, a minimum of three members of the Board of Trustees must serve on the Board of Directors.

From the facility's inception in 1949 until 2002, the City owned the facility and the land on which it sits. In 2002, ownership of the facility and the land was transferred to the Public Building Commission of the City of Coffeyville (PBC). The PBC, in turn, leased the land and facility back to the City. The City, in turn, subleased the land and facility to the Employer. The Employer's CEO, Gerald J. Marquette, Jr., testified that these transactions are reflected in two separate contracts and that these contracts govern how the City deals with the Employer. The record reflects that these transactions were done in connection with financing an expansion of, and improvements to, the facility.

The City

The City is governed and managed by a City Commissioner/City Manager form of government. The record reflects that the five-member City Commission is elected on an at-large basis. The City Commission appoints the City Commissioner. The City has a Mayor, but the record reflects that the Mayor has largely symbolic duties. It is undisputed that issues relating to the Employer's facility are among the various public issues that the City Commission considers, and on which its members vote. The Petitioner's Business Agent, Messer, has been a member of the City Commission since April 8, 2003.

The City employs both union-represented and non-represented employees. Represented employees include those in the police, fire, and electrical distribution, water waste, and power plant departments. The Petitioner represents employees in the water waste and power plant departments. It is undisputed that the City provides the Employer's electrical, water, and sewage needs.

The Petitioner

The Petitioner is a labor organization within the meaning of Section 2(5) of the Act and has an office in Coffeyville, Kansas. In addition to representing some of the City's employees, the Petitioner represents employees at Farmland Industries, a local privately owned refinery.

Pursuant to its by-laws, the Petitioner's principal officer is its Business Manager, a position held by Messer since in or about 1996. Messer and all other officials of the Petitioner serve on a part-time basis. From 1996 until in or about April 2003, Messer was directly responsible for negotiating and administering the collective-bargaining agreements between the City and the Petitioner covering the City's water waste and power plant department employees. In or about April 2003, Messer appointed Mike Shook as a Business Representative for these employees. Thereafter, Shook assumed the direct responsibility for contract negotiations and administration for these employees, although he remains subordinate to Messer.

Business Manager Messer's Attempts to Avoid a Potential Conflict of Interest

Messer testified that, sometime prior to taking office as a City Commissioner in early April 2003, but while he was organizing the Employer's employees, he contacted the League of Municipalities. Shortly after taking office in early April 2003, he again contacted the League of Municipalities, as well as the Kansas Government Ethics Commission and the Kansas Attorney General's Office. Messer testified that, during telephone conversations with representatives of each agency, the representatives assured him that they saw no conflict of interest in him serving as a City Commissioner while

also serving as the Petitioner's Business Manager. Messer testified that he received no written opinions from the three agencies because the representatives informed him that none were necessary. Messer said that he understood that the agencies' representatives had sufficient authority to make the conflict of interest determination.

Employer's Exhibit 15 reflects that, by memorandum dated April 3, 2003, from Messer to the Petitioner's members, Messer appointed Shook as business representative for the City employees in order to make his position as City Commissioner "effective" and to "prevent any conflict of interest." In the memorandum, Messer stated that, while he would maintain representation of all members in his position as Business Manager, he:

> "will not be privy to any information regarding city negotiations that is considered private information of the negotiating unions and our negotiating committee. This does not mean that I cannot discuss negotiations with the union, which any City Commissioner can, but the information must be limited to what information all [City] [C]ommissioners would be allowed to have."

Messer testified that, in addition to distributing the memorandum to the Petitioner's members, he submitted a copy of the memorandum to the City Commissioners on April 8, 2003. Messer testified that he discussed the conflict of interest issue with the City Commission during an executive session on that date. Messer described Shook as his assistant and acknowledged that, in addition to having direct responsibility for representing City employees, Shook has assisted Messer in the Petitioner's efforts to organize nurses at the Employer's facility.

On April 23, 2003, Messer and Shook appeared before a meeting of the Employer's Board of Trustees. Messer read from a statement, Union's Exhibit 2, which, among other things, noted that Shook represented City employees on behalf of the

Petitioner and that Messer had cleared any potential conflicts of interest with the League of Municipalities and the Government Ethics Commission.

Employer's Exhibit 16 is entitled "Conflict of Interest Statement by Dee L. Messer, Coffeyville City Commissioner." Messer testified that the Kansas Attorney General's office recommended that Messer draft such a statement in order to "prevent" a conflict of interest. Messer testified that he submitted the statement to the City Commission at its July 22, 2003, meeting. In the statement, Messer acknowledged that each city commissioner has the possibility of a conflict of interest and that his possible conflict was in regard to his position as the Petitioner's Business Manager. Messer further remarked in the statement that he responded to the potential conflict stemming from his representation of City employees by "isolating myself from city/union business." Messer also noted his contacts with the League of Municipalities, the Government Ethics Commission and the Attorney General's Office and their opinion that no conflict existed. Minutes of the City Commission's July 22, 2003, meeting, Employer's Exhibit 10, show that Messer read such a statement and the contents of the statement are summarized in the minutes. Messer testified that the City Commission approved the July 22, 2003, minutes at a subsequent meeting. In his testimony, Messer characterized this action as the City Commission voting for its approval of his plan to avoid a conflict of interest.

Evidence Relating to the Alleged Conflict of Interest

The record reflects that, during his April 23, 2003, presentation to the Employer's Board of Trustees, Messer discussed the Employer's employees' desire for representation by the Petitioner and the process of organizing a union. Although Messer had already

been sworn in as a City Commissioner by that date, there is no evidence on the record that he identified himself to the Board of Trustees as anything other than the Petitioner's Business Manager while making his presentation. At the close of his presentation, Messer requested that the Employer recognize the Petitioner either through a verification of union authorization cards or through a secret ballot election conducted by the State of Kansas. The record reflects that, at that time, the Petitioner believed that the Employer was under the jurisdiction of the Kansas Public Employees Relations Board (KPERB).

On July 27, 2003, the Petitioner paid for an advertisement, Employer's Exhibit 6, which ran in the Coffeyville Journal entitled "Who do you trust?" The advertisement urged readers to "support the RN's of CRMC," and stated that the Employer had, among other things, "announced in a federal hearing that al RN's were ineligible to be in a union and would fight it all the way to Washington, D.C." Messer testified that he authored the advertisement. The advertisement states that it was paid for by the Petitioner, but does not indicate that Messer authored the advertisement. Messer's name does not appear on the advertisement.

CEO Marquette testified that, on or about August 3, 2003, he saw an advertisement in the Coffeyville Journal, Employer's Exhibit 7. The advertisement indicates that the Petitioner paid for it. The names of the Board of Trustees members, the Board of Directors members and the Hospital Administrator appear on the advertisement and the advertisement urges readers to contact those officials and "tell them how you feel about the treatment of the employees of CRMC." Messer's name does not appear on the advertisement. Messer testified that he authored two advertisements in the Coffeyville

Journal, but it is unclear on the record as to whether Messer was identifying Employer's Exhibit 7 as one of the two advertisements.

Messer testified that he authored a letter to the editor of the Coffeyville Journal, Employer's Exhibit 8, which it published in its August 17, 2003, edition. In the letter, Messer criticizes the Employer specifically, and management in the health care industry in general, for taking positions that, in Messer's view, prevents nurses from gaining union representation. Messer testified that he signed the letter as the Petitioner's Business Manager. In fact, the letter to the editor indicates only that Messer is Petitioner's Business Manager and makes no reference to his position as a City Commissioner.

On August 14 or 15, 2003, a flyer, Employer's Exhibit 9, was posted on one of the Employer's bulletin boards. The flyer, entitled "To the Registered Nurses and Other Interested Parties," is on the Petitioner's letterhead and lists Messer as the Business Manager, along with the names and titles of other officials of the Petitioner. The flyer criticizes the Employer for making "the organizing process adversarial." The name of the flyer's author does not appear on the flyer. There is no evidence that Messer authored Employer's Exhibit 9.

Messer testified that, in making some television appearances in connection with the Petitioner's organizing efforts, he presented himself to the interviewer as Petitioner's Business Manager and not as a City Commissioner.

CEO Marquette testified that he was not aware of any instances in which the City ever threatened to withhold public services from the facility. Marquette also testified that he was not aware of anything Business Agent Messer had done in his capacity as a City Commissioner to in any way influence the Board of Trustees concerning labor relations

at the Employer's facility. Marquette further testified that he was not aware of any evidence that Messer had engaged in a conflict of interest.

Employer's Response to Petitioner's Attempt for Recognition via the KPERB

Initially, the Petitioner sought to represent the Employer's employees under the laws of the State of Kansas. On May 3, 2003, the Petitioner filed for a petition for "unit determination" with the KPERB. In response, the Employer filed a Motion to Dismiss, Union's Exhibit 1, primarily on the basis that the Employer was not subject to the jurisdiction of the KPERB. In its motion, the Employer states that:

> Since 1996, the City has exercised no control over the operations of CRMC or its employees' terms and conditions of employment. CRMC has contracted with Quorum Health Resources, Inc., a provisional hospital management services provider (and itself a private corporation), to provide management services for the hospital. Ultimate management responsibility rests with the CRMC's board of directors, who have hired a Chief Executive Officer to oversee the Center's operations. CRMC directors are appointed by the Board of Trustees, who are appointed by the City. *The City has no ability to influence overall or day-to-day management and operations of CRMC*. Further, the City neither employs, or exercises any control, over the terms and conditions of employment of CRMC employees." (*Emphasis supplied*.)

CEO Marquette testified that he agreed with the accuracy of those statements in the Employer's Motion to Dismiss.

ANALYSIS

The Stipulated Appropriate Bargaining Unit

Based on the parties' stipulations on the record, I find that the following unit is an appropriate unit for collective bargaining:

> All full-time and regular part-time staff registered nurses employed in the Nursing Services Department, engaged in patient care at the Coffeyville, Kansas, facility, all PRN nurses employed at the Coffeyville, Kansas, facility who have worked a minimum of 120 hours during either of the two three-month periods preceding

> September 16, 2003, EXCLUDING: temporary agency nurses, guards and supervisors as defined in the Act.

The record reflects, the parties agreed, and I find, that the PRNs' eligibility is subject to the formula established by the Board in Marquette General Hospital, 218 NLRB 713 (1975). The parties stipulated, and I find, that, in applying that formula, the following PRN employees are eligible to vote: Sharylon Demott, Goldie Kiister, Rosalind Rapp, Theresa Barker, Gina Maria Botts, Mary Eden, Margaret English, Carolyn Johnson-Phillips, Beverly McCoach, Carol Mitchell, Carmen Lynn Ragan, Kay Stitch and Sheryl White. The parties further stipulated, and I find, that, in applying the formula, the following PRN employees are not eligible to vote: Lorie Bale, Cheryl Drews, Paul Hefley, Sarah Hoy, Barbary Hugo, Lori Rexwinkle, and Lucinda Shields

Based on the parties' stipulation, I also find that the following individuals, working in their respective positions, are supervisors within the meaning of Section 2(11) of the Act and should be excluded from the collective-bargaining unit: chief nursing officer Judy Hiner; medical surgical director Merna Cramer; ICU/ER director Susan McDaniel; outpatient services director Sylvia Drews; field nursing facility/home health director Vicki Portwood; surgical services director Evalyn Farmer; women's health director Sharon Triebel; behavioral health nurse manager Karen Loeb; case manager director Kathy Alford; education department supervisor Ann Murrow; medical/surgical pediatric charge nurses Betheen Armstrong, Nanette Rickner, and P. Susan Thomason; peri-operative charge nurses Gayle Keith and Alice Kirkland; and house supervisors Pam Wilson, Linda Griffin, Lori Isle, Bruce Bowles, Deborah Owen and Mary Conrad. The parties stipulated, and I find, that these individuals have the authority to hire, fire,

discipline or effectively recommend such actions and, as such, should be excluded from the unit.

Finally, based on the parties' stipulation, I find that temporary nurses do not share a sufficient community of interest with employees included in the stipulated appropriate unit and, as such, are specifically excluded from the unit.

The Standard of Review: Is There a Clear and Present Danger of a Disabling Conflict of Interest on the Part of the Petitioner and/or Business Manager Messer

The Board has held that, "employees have the right to be represented in collective-bargaining negotiations by individuals who have a single-minded loyalty to their interests." Bausch & Lomb Optical Company, 108 NLRB 1555, 1559 (1954). Thus, the Board has disqualified labor organizations from participating in collective bargaining where there exists a "clear and present danger" of a conflict of interest interfering with the collective-bargaining process. See, e.g., Bausch & Lomb; and Sierra Vista Hospital, Inc., 241 NLRB 631, 633 fn. 22 (1979), citing N.L.R.B. v. David Buttrick Company, 399 F.2d 505, 507 (1st Cir. 1968).

The burden is on the employer to show a disqualifying interest. If the employer meets its burden, it may lawfully refuse to bargain with the union or, as the Employer urges in the instant matter, the Board may dismiss the union's representation petition. The Board has also ordered in such cases that a representation election be held, but that the Regional Director withhold certification pending a finding that a union official, with a disabling interest, is no longer serving the union in the employer's geographic area. Harlem Rivers Consumers Cooperative, Inc., 191 NLRB 314 (1971).

The Board has noted that the employer's burden in showing a disabling conflict of interest on the part of a union or one of its officials is heavy, due to a "strong public policy favoring the free choice of a bargaining agent by employees." Garrison Nursing Home, 293 NLRB 122 (1989). The Board has rejected employers' conflict of interest claims where it has found the supposed danger to be speculative. See, e.g., CMT, Inc. 333 NLRB 1307 (2001), citing Alanis Airport Services, 316 NLRB 1233 (1995).

Employer's Position

The Employer primarily relies on the Board's decision in Bausch & Lomb, 108 NLRB 1555 (1954) in support of the proposition that the Petitioner and Business Manager Messer have a disabling conflict of interest in the collective-bargaining process. In Bausch and Lomb, the Board found that the union had formed a company that was in direct competition with the employer. The employer and the union's company both engaged in the manufacture and sale of eyeglasses and other optical products in the same geographic area. The Board, in disqualifying the union as the employees' collective-bargaining representative, found that "the union's dual status is fraught with potential dangers," that its "status of a business competitor renders almost impossible the operation of the collective bargaining process," and that, under the circumstances, the Union would be tempted to bargain with its business, rather than collective bargaining, interests in mind. Id. at 1560, 1562.

The Employer also observes that, in light of Section 8(a)(2) and 8(b)(2) of the Act, as well as various Board decisions, including Electromation, Inc., 309 NLRB 990 (1992), Congress and the Board clearly envision an adversarial model of collective

bargaining, with each party to the relationship bringing distinct interests to the bargaining table.

Applying these legal principles, the Employer asserts that the Petitioner and Business Manager Messer's relationship with the City demonstrates a clear and present danger of a disabling conflict of interest. The Employer makes this assertion in the context of a collective-bargaining scenario. The Employer, in this scenario, is mindful of the City's role of "landlord" of the facility; cooperative business partner with multi-million dollar stakes in the Employer's operations; representative of the citizens of the City, who have an interest in quality health care; and provider of power, water, sewage and other utilities to the Employer's facility. The Employer, in this scenario, is also mindful of the Petitioner which represents certain City employees who work to provide basic services to the Employer's facility (and whose union and concerted activities are not subject to the Act); that the Petitioner's Business Representative Shook represents these City employees and assisted in organizing the Employer's employees; and that the Petitioner's Business Manager Messer is responsible for negotiating on behalf of the Petitioner and is the Petitioner's Chief Executive Officer.

Perhaps most significant, the Employer, in this scenario, knows full well that Business Manager Messer is also City Commissioner Messer, and that Messer's position in the City allows him to exert influence over City government, membership of the Board of Trustees and, consequently, influence over the Employer's operations. In this scenario, the Employer argues, it would be unable to discern what interests the Petitioner brings to the bargaining table and how the City will react to particular collective-bargaining proposals advanced by either party. The Employer also fears that, as the

representative of certain city employees, the Petitioner can yield economic weapons, beyond the reach of the Act, that will put the Employer at a disadvantage at the bargaining table (e.g., work stoppages or slowdowns by electrical plant employees). In short, the Employer asserts that it would be handcuffed in bargaining with the Petitioner.

With respect to the Petitioner's and Messer's efforts to insulate any future collective bargaining from potential conflicts of interest, the Employer argues that those efforts are not sufficient. Thus, Messer remains the Petitioner's CEO and is Business Representative Shook's supervisor. Likewise, although Messer asserted to his colleagues on the City Commission that he will refrain from participating in certain actions relating to the Employer (e.g., appointments to the Board of Trustees), Messer was silent on a host of other ways he might influence hospital policies (i.e., *all other* relevant actions).

The Petitioner's Position

The Petitioner asserts that there is no disabling conflict of interest and that the facts of this matter are distinct from the facts of Bausch and Lomb in one crucial way: the Petitioner has not formed a company to compete with the Employer. The Employer, by the admissions of its own CEO and in its Motion to Dismiss to the KPERB, has verified that, in fact, the City has no control over the operations of the Employer's facility. In support of this argument, the Petitioner primarily relies on American Arbitration Association, 225 NLRB 291 (1976).

The Petitioner contends that, even assuming there exists the potential of a conflict in connection with Messer's role as collective-bargaining representative, Messer and the Petitioner have preempted such conflict. Thus, Messer appointed Shook to represent City employees and Messer has stated, in records approved by the City Commission, that he

will refrain from engaging in any Commission actions which impact on the terms and conditions of employment of the Employer's employees.

Citing Beverly Enterprises-North Dakota, Inc., 293 NLRB 122, 124 (1989), the Petitioner further asserts that, even if Messer's dual roles present a disabling conflict, the Region should direct an election and, if the Petitioner receives a majority of the votes cast, withhold certification for a period of 6 months in order to allow Messer to relinquish his position as City Commissioner.

Finally, the Petitioner urges the Board to reverse its decision in Bausch and Lomb in light of its subsequent application of the duty of fair representation on unions, and the attendant ability of bargaining unit employees to seek a remedy of conflicts of interest under the Act.

There Exists No Clear and Present Danger that Either the Petitioner, or Business Manager Messer Have a Disabling Conflict of Interest

The City's Relationship to the Employer

Clearly, the City has an interest in the operation of the Employer's facility. Thus, the record reflects various levels of oversight of the Employer's operations and various agreements aimed at improving and expanding the operations of the Employer, which is the primary healthcare provider in the City. However, by design, the City's government is thrice removed from the Employer's operations. Thus, the City Commission appoints members to the Employer's Board of Trustees and constitutes the third level of oversight of the Employer's facility. Next, members of the Board of Trustees appoint members of the Board of Directors and constitute the second level of oversight of the Employer's facility. Finally, the Board of Directors has, for the past 18 years, contracted with a

private hospital management company to operate the facility, which is the first level of overseeing the day-to-day operations of the Employer's facility. The City's relationship with the Employer is further governed by at least two contracts involving the City, the PBC and the Employer.

In its factual representations to the KPERB, the Employer went to great lengths to demonstrate the weakness of the relationship between the City and the Employer's operations. Thus, in its Motion to Dismiss which it filed with the KPERB, which was reaffirmed by the Employer's CEO in the NLRB hearing as accurate, the Employer cited numerous facts to support its conclusion that: "*The City has no ability to influence overall or day-to-day management and operations of CRMC*." The Employer's aim was to demonstrate that the Employer was not a public employer within the meaning of the laws of the State of Kansas.

The facts cited by the Employer at the time of its Motion to Dismiss which it filed with the KPERB, were substantially unchanged at the time of the NLRB hearing. Nevertheless, in its brief in the instant case, the Employer goes to great lengths to show a close relationship between the City as landlord and service provider to the Employer's facility, as the Employer's business partner and as providing ultimate oversight of its operations. The Employer characterizes its statements in its Motion to Dismiss to the KPERB as "isolated," and suggests that, since filing the motion, Messer's actions have raised the "potential… for a City Commissioner or Commissioners to utilize their appointment or removal power as to Trustees, who appoint and elect CRMC's Board of Directors, who in turn manage CRMC."

The record reflects that the City's influence over the Employer's operations is somewhere between the polar opposite positions taken by the Employer at the KPERB and its position in the instant matter. Thus, the City Commission, through its appointment of members of the Board of Trustees can, based on the collective judgment of its members, appoint Board of Trustee Members who presumably will work toward certain policy goals. Members of the Board of Trustees can, in turn, transmit those policy goals to the Board of Directors, which it appoints. The Board of Directors, in selecting and retaining the professional management company, can further those policy goals. The record does not support a finding that the City has *no* ability to influence the Employer's operations. Yet, the record also does not support the notion that the City has a heavy hand in the operation of the Employer's facility, including labor relations. Rather, the City, through its City Commission, exercises tertiary-level oversight based on a consensus of its members and this oversight is diluted as it passes through secondary and primary layers of oversight, and the day-to-day operational decisions of the private hospital management company.

With respect to the City's ability to influence the operation of the Employer's facility through the City's provision of various services, such as road maintenance, electrical power and water supply, the record does not show that the Employer is unique in this regard. Thus, the City presumably could, as the Employer fears, cut off services to any private entity it sought to influence. There is no evidence on the record that it has ever done so.

Messer's Dual Roles

The record reflects that, in anticipation of the potential for a conflict of interest, Messer took numerous steps to head off such a conflict. Thus, he contacted three state agencies and was advised by each agency that his maintaining dual positions as Business Manager and City Commissioner was not a conflict of interest. Nevertheless, Messer formalized his decision to shield himself from a conflict between his role as a City official and his role as the bargaining agent of both City employees and the Employer's employees on three occasions, including two times in a public forum. Thus, Messer pledged to remove himself from direct representation of City employees, to shield himself from any proprietary information involving City/Petitioner collective-bargaining negotiations, and to recuse himself from City matters involving labor relations at the Employer's facility, or the appointment of members to the Employer's Board of Trustees.

When coupled with the attenuated relationship between the City and the Employer's facility, Messer's efforts to insulate himself from many potential conflicts of interest demonstrate that there is no clear and present danger that any remaining potential conflicts would taint the Petitioner in its role in the collective-bargaining process. The Employer is correct that there may be a number of ways in which Messer, as a City Commissioner, can voice policy concerns related to the Employer's operations. However, Messer's role in, for example, voting on resolutions regarding the Employer's operations, would be as a single member of a five member City Commission. His influence in this regard would require the consensus of the City Commission and it would necessarily be filtered through the Board of Trustees, the Board of Directors and the private hospital management company.

In Bausch and Lomb, there was ample basis for the Board to conclude that the union, an owner of a company in direct competition to the employer, would come to the bargaining table in its dual capacity of bargaining agent and business competitor. The circumstances created by the union were "fraught with potential dangers" precisely because the union might take positions at the bargaining table so that it could further its competitive business interest. Id. at 1559-1560. Here, the danger is not clear because Messer's dual role as the Petitioner's Business Manager and one of the City's Commissioners does not, in and of itself, warrant anything beyond speculation that he might come to the bargaining table with interests against the Employer's continued viability, or against the bargaining unit's interests in terms and conditions of employment. In Bausch and Lomb, it was reasonable for the Board to foresee that the union might take bargaining positions to, for example, drive the employer out of business and thereby undermine the employees' interests. Here, it is not only speculative to assume that the Petitioner or Messer would have such a divergent interest from the employees, it is reasonable to assume that Messer would, in his capacity as an elected City Commissioner, wish to see the Employer's operations flourish.

The instant matter is more akin to American Arbitration Association, 225 NLRB 291 (1976), a case cited by the Petitioner, than to Bausch and Lomb. In American Arbitration Association, the employer asserted that the union had a disqualifying interest because it was a member of the employer's board of directors. The Board found that the union's participation in the employer's board of directors would not present an *irreconcilable* conflict of interest. Id. at 292. Significant to the Board was the fact that

the union's participation in the 100-member board of directors was too diluted to divert it from its duty of representation to the employees. Id.

Here, while the City Commission is smaller and, therefore, more susceptible to influence by a single member, it is far removed from the Employer's operation with its influence mitigated by layers of oversight and management. Moreover, as in American Arbitration Association, the potential conflicts of interest are not *irreconcilable* in light of Messer's efforts to insulate the collective-bargaining process from any conflicting duties in his position as City Commissioner.

The Petitioner's Dual Roles

Likewise, I find that the Petitioner's dual roles as bargaining agent to both certain City employees and to the Employer's employees is not a disqualifying interest. The Employer's assertion that there exists a potential that, in order to influence labor relations between the Petitioner and the Employer, represented City employees might engage in work slowdowns or stoppages and thereby threaten the operation of the facility is pure speculation. In cases involving unions representing employees of an employer and employees employed by a subcontractor used by the employer, the Board has held that a finding of a clear and present danger of a conflicting interest requires some showing of an overt act by the union that its dual roles jeopardize its ability to represent both units of employees. Compare Valley West Welding Company, Inc. 265 NLRB 1597 (1982) (finding a disqualifying conflict of interest) with CMT, Inc. 333 NLRB 1307 (2001); and Alanis Airport Services, 316 NLRB 1233 (1995) (each finding no disqualifying conflict of interest). The record does not show the existence of any such overt act by the Petitioner. Significantly, the record does show, however, that the Petitioner represents

employees at a local refinery. There is no evidence on the record that the Petitioner has ever attempted, through its representation of City employees, to influence the operations of that refinery.

Against the Employer's speculation that the Petitioner and Business Manager Messer might have a conflict of interest in a collective-bargaining relationship with the Employer is the Board's strong public policy favoring the free choice of a bargaining agent by employees. Under these circumstances, I find that that policy prevails.

CONCLUSION

Based on the foregoing, I find that there exists insufficient evidence to show a clear and present danger of a disqualifying conflict of interest on the part of either Business Manager Messer or the Petitioner. As such, I shall direct an election in the stipulated appropriate collective-bargaining unit.

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